Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1444

THOMAS E. JOYCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS E. JOYCE
2750 W. 70th Street
Chicago, Illinois 60629
Attorney Pro Se

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	7
APPENDIX A—Order of the United States Court of Appeals for the Seventh Circuit	1a
APPENDIX B—Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois	5a

List Of Authorities Cited

Cross v. United States, 117 U.S. App.D.C. 56, 325 F.2d 629	5
Johnson v. Zerbst, 304 U.S. 358	5
Milton Cureton v. United States, 396 F. 2d 671 (1968)	4, 5
United States v. William B. McPherson, 421 F.2d 1127	6
United States Constitution, Sixth Amendment	4, 6
Rule 43 of the Federal Rules of Criminal Procedure	4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Thomas E. Joyce, prays that a writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit in Thomas E. Joyce vs. United States of America No. 75-1588 was an unpublished Order of Jan-

uary 12th, 1976. It is printed in the Appendix to this petition. (App. 1a). The opinion of the Trial Court Judge Richard W. McLaren (now deceased) is not officially reported but is printed in the Appendix to this Petition. (App. 5a)

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit was set forth January 12th, 1976. It was a civil proceedings under 28 U.S.C. §2255. The jurisdiction of this court is invoked under 28 U.S.C. and, of course, the constitutional rights of Petitioner have been violated.

QUESTIONS PRESENTED FOR REVIEW

1. Under Rule 43 of the Federal Rules of Criminal Procedure and the Sixth Amendment to the United States Constitution could Petitioner constitutionally waive his right to be present during a vital stage of the trial?

2. Must the defendant's absence during a crucial part of the trial, including the presentation of evidence by two co-defendants and the government's rebuttal evidence be, without question, voluntary?

STATEMENT OF THE CASE

An indictment in fifteen counts was filed on May 27th, 1971 charging in each count a violation of Title 18, U.S.C. §1341, commonly known as the mail fraud statute.

In Count One the alleged scheme is set forth, naming this Petitioner and three co-defendants, one Burton Sherre, Harry Wallace and Robert L. Ostrander as co-defendants in each of said counts.

The case was brought on trial on June 15th, 1972. The night prior to the day the defense was to begin, this petitioner became seriously ill requiring hospitalization. He did not attend for the defense, the government's rebuttal evidence, argument, instructions or verdict. Except for Count Two (dismissed by the Government) the Petitioner was found guilty on all counts by the Jury. Subsequently through various motions and legal court proceedings, including an appeal to the U.S. Court of Appeals, all counts were dismissed except the following six: 1, 8, 9, 10, 11 and 15. The attorney for Petitioner on appeal did not bring to the Court's attention the violation of his rights to be present at important stages of his trial. Petitioner in due and timely action filed under Section 2255.

REASONS FOR GRANTING THE WRIT

Rule 43 of the Federal Rules of Criminal Procedure for the United States District Courts adopted by the Supreme Court of the United States states: "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the Jury and the return of the verdict, and at the imposition of the sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." Petitioner was hospitalized because of a severe sudden kidney stone attack and he was also, while hospitalized, found to be suffering from Bovine Tuberculosis. This sudden hospitalization was involuntary. The rule further states: "In prosecutions for offenses punishable by fine or imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence." In Petitioner's case the offenses were punishable by fine or imprisonment of more than one year or both and his absence was involuntary. Therefore the waiver of his being present signed by the Petitioner, and not witnessed, on the morning of the first day of his hospitalization was void and would not waive his Sixth Amendment constitutional right to be present and confront witnesses.

Milton Cureton v. *United States* 396 F. 2nd. 671 a 1968 decision states: "The 1943 Notes of the Advisory Committee on the Rules of Criminal Procedure contain the following comments on the preliminary draft of Rule 38, which became Rule 43; The right of a defendant in a criminal case to be present at every stage of the proceedings after an indictment has been found or an information filed and until sentence is imposed, is preserved. See United States Constitution, amendments V and VI. . . ." This case further stated on page 674, "We said (*Cross* v. *U. S.* 117 U.S. App.D.C. 56, 325 F.2nd 629) that the provision regarding voluntary absence had 'no clear application to defendants in custody,' its purpose being 'to prevent frustration of a trial in progress by the escape or absconding of the defendant.' We also held that Cross had not validly waived his right to be present by telling his attorney that he did not want to go into the courtroom, since the standards for waiver of a constitutional right, set forth in *Johnson* v. *Zerbst,* 304 U.S. 358, were not met." Again on page 675 the case sets forth in its decision "In the above circumstances, taking into consideration the right, the obligation, and the orderly administration of Justice takes account on the one hand of the importance of a defendant's presence and, on the other hand, the need for control of the situation by the court, we conclude that if a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." Further, on page 676 it says "it is not clear, in sum, that in all the circumstances there was an absconding or the like, though there might have been." The record herein will show (Joyce) the Petitioner as always on time and present throughout all Grand Jury proceedings when called, at all motions and at all proceedings of the trial until the day of the severe kidney stone attack and the Tuberculosis diag-

nosis. Also, another stipulation, reproduced in the Appendix of Petitioner's Brief in the U.S. Court of Appeals, was signed without the authority or knowledge of Thomas E. Joyce, although the stipulation says: "Comes Thomas E. Joyce, defendant in the above cause in his own proper person and by Julius Lucius Echeles, his attorney, and hereby waives any and all objections and consents to the jury being permitted to separate. . . ." This was not signed by Petitioner, Thomas E. Joyce, although Rule 43 states that written consent must be given by the defendant for offenses punishable by fine or imprisonment for *not* more than one year or both. But for an offense punishable by fine or imprisonment of more than one year or both the absence *must be voluntary*. The court itself had never discussed or questioned this Petitioner concerning his absence or his signature on the waiver. This second stipulation defendant never knew existed until he noticed it when checking the court file and made a photostatic copy of the original. This lacks the signature of the Judge. In *United States of America* v. *William B. McPherson,* 421 F. 2d 1127 it states on page 1129: "The right to be present at trial which inheres in the Sixth Amendment and has been codified by Rule 43 of the Federal Rules of Criminal Procedure, has long been recognized as being of fundamental importance to the just administration of the Criminal law."

CONCLUSION

Wherefore, this Petitioner respectfully prays the Court to issue its writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

THOMAS E. JOYCE
2750 W. 70th Street
Chicago, Illinois 60629
Attorney Pro Se

April 9, 1976

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued December 10, 1975
January 12, 1976.

Unpublished Order
Not To Be Cited
Per Circuit Rule 28

Before

Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT W. WARREN, *District Judge*•

THOMAS E. JOYCE,
Petitioner-Appellant,

No. 75-1588 vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75 C 198
Richard W. McLaren, Judge.

ORDER

In 1972, petitioner was convicted by a jury of seven counts of mail fraud in violation of 18 U.S.C. § 1341. We affirmed as to six of the seven counts. *United States* v. *Joyce*, 499 F.2d 9 (7th Cir. 1974), certiorari denied, 419 U.S. 1031.

• District Judge Robert W. Warren of the Eastern District of Wisconsin is sitting by designation.

In January 1975, pursuant to 28 U.S.C. § 2255, petitioner sought to have his conviction vacated on the ground that his written waiver of presence at the last day of trial testimony was involuntary. His absence was due to illness. In his petition, Joyce admits that "while he was hospitalized • • • he may very well have signed a waiver to his being present for the balance of the trial." At the oral argument, he admitted that his signature does appear on the waiver. It was presented to him by his seasoned counsel who witnessed the signature.[1] This waiver was executed on June 29, 1972. Since Joyce had rested his case on June 28, he could have testified earlier on his own behalf if he had chosen to do so. Petitioner missed only the presentation of evidence by two co-defendants, the Government's rebuttal, and the closing arguments. The trial judge granted the Government's motion to dismiss this petition because the issue had not been raised in post-trial motions or on direct appeal, citing, *inter alia, Kaufman* v. *United States,* 394 U.S. 217, 227; and *Grieco* v. *United States,* 435 F.2d 677 (7th Cir. 1970), certiorari denied, 401 U.S. 1009. We affirm.

Although he now claims that his absence violated Rule 43 of the Federal Rules of Criminal Procedure,[2] petitioner has

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1 The waiver read as follows:

"I, Thomas E. Joyce, defendant herein, hereby waive my presence for the rest of the trial and hereby authorize my attorney, Julius Echeles, to continue to represent me without my presence."

2 Rule 43 of the Rules of Criminal Procedure then read:

"The defendant shall be present at the arraignment, at every state of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

not satisfactorily explained why this issue was not raised on direct appeal. Therefore, it may not be presented under Section 2255. *Grieco* v. *United States, supra,* 435 F.2d at 678.

Regardless of having waived his proper remedy, Joyce is not entitled to relief. Relying on the fourth sentence of Rule 43, Joyce contends that the Rule did not permit a voluntary written waiver where the offense is punishable by fine or by imprisonment for more than one year or both (see note 2, *supra*). This interpretation would render nugatory the second sentence of the Rule which provided:

> "In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." Note 2, *supra.*

The conflict is apparent, not real, because the sentence relied upon by petitioner was designed to permit absence even from arraignment, plea and imposition of sentence in misdemeanor cases and does not restrict defendant's right to absent himself from a felony trial pursuant to the second sentence of the Rule. See *Taylor* v. *United States,* 414 U.S. 17, 18-19 (per curiam); 8A Moore's *Federal Practice,* ¶43,02[2] at 43-10—43-11 (2d ed. 1975).[3]

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3 *Cureton* v. *United States,* 396 F.2d 671 (D.C. Cir. 1968), is not to the contrary because it did not involve a written waiver consenting to continuation of the trial and defense counsel's statement of defendant's desire that the trial continue in his absence. Moreover, *Cureton* acknowledged the rule of *Diaz* v. *United States,* 223 U.S. 442, reaffirmed in *Taylor* v. *United States, supra,* that a defendant may voluntarily absent himself from his non-capital felony trial.

Petitioner next argues that his waiver was not voluntary. However, on June 29, in open court, defendant's counsel advised Judge McLaren that on that date "He [Joyce] signed this [waiver] document in my presence and I am your Honor's officer. This is his signature." Counsel also advised the court "that Mrs. Joyce said Mr. Joyce preferred if possible that the trial continue in his absence,"[4] prompting counsel to obtain the waiver; it was filed "with his [Joyce's] permission" after discussion with his counsel. This waiver was approved as voluntary by the trial court and was authorized by the second sentence of the Rule. Moore *op. cit.* at 43-7 and 43-11.

Finally, petitioner's brief contains certain allegations about the check forming the basis of count 1 of the indictment. This matter was not raised in petitioner's Section 2255 motion and was not passed upon by the district court. In any event, it cannot be relitigated by collateral attack. *Levine* v. *United States,* 430 F.2d 641 (7th Cir. 1970).[5]

The district court's order is affirmed.

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[4] Attached to petitioner's reply brief is a December 1975 affidavit of Mrs. Joyce somewhat to the contrary. This affidavit was not filed in the district court and is not in the record. In addition, to its self-serving nature, it was made over two and one-half years after the event when recollections would ordinarily become hazy.

[5] Joyce concedes that this matter was not before the district court through his Section 2255 motion (reply br. 4). A fortnight after the Section 2255 petition was docketed, Joyce raised the matter in an affidavit mainly seeking release from custody. In the affidavit, he candidly stated that this subject "may not have a direct bearing on the section 2255 petition herein • • •." The request for release from custody is moot because Joyce commenced service of his one-year sentence under count 1 on August 2, 1974. Only fines and probationary terms were imposed upon him under the other counts. See *United States* v. *Joyce, supra,* 499 F.2d at 13.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

THOMAS E. JOYCE,
Petitioner,

vs. No. 75 C 198

UNITED STATES OF AMERICA,
Respondent.

MEMORANDUM OPINION AND ORDER

This cause is before the Court on the respondent's motion to dismiss petitioner Joyce's 28 U.S.C. §2255 action for failure to state a claim upon which relief can be granted. For the reasons set forth below, the motion will be granted.

Petitioner's claim is based on his Sixth Amendment right to confront witnesses and his F.R.Cr.P. 43 right to be present at all stages of his trial. Briefly stated, the facts are as follows: petitioner and several others were indicted for participation in a mail fraud scheme. The case was tried in this Court before a jury which found petitioner and his co-defendants guilty on a series of counts. Extensive post-trial motions were entertained and ultimately this Court dismissed several, but not all, of the counts on which petitioner had been found guilty by the jury. Petitioner then appealed to the Seventh Circuit, which affirmed this Court's decision on all counts except Count 13. *United States* v. *Joyce,* 499 F.2d 6 (7th Cir. 1974), *cert. den.,* ..... U.S. ..... (1974).

On the last day of trial, June 29, 1972, petitioner fell ill and was hospitalized. He executed a written waiver of presence which was presented in open court by his attorney. The record shows that petitioner was absent during presentation of evidence by the two co-defendants, the government's rebuttal evidence, and closing arguments. Petitioner now

contends that his signed waiver was not voluntary within the meaning of F.R.Cr.P. 43 and that his absence was highly prejudicial because he was unable to assist his counsel in cross-examining a co-defendant who accused petitioner as the key operator in the scheme in question.

This contention is not timely. Petitioner was represented by able counsel at trial and on appeal. It is clear petitioner and counsel were well aware of the facts that form the basis of this action at trial and on appeal. See, *e.g., United States* v. *Joyce,* 499 F.2d at 21; Brief of Defendant-Appellant Joyce, pp. 56-59, *United States* v. *Joyce.* A §2255 action is not the applicable remedy in such circumstances. In *Kaufman* v. *United States,* 394 U.S. 217 (1969), the Supreme Court noted that

> "the §2255 court may in a proper case deny relief to a federal prisoner who has deliberately by-passed the orderly federal procedures provided at or before trial and by way of appeal." 394 U.S. at 227, n. 8.

See also *United States* v. *West,* 494 F.2d 1314 (2d Cir. 1974); *Grieco* v. *United States,* 435 F.2d 677 (7th Cir. 1970). Petitioner has cited no special circumstances explaining why the instant issue was not raised in post-trial motions or on direct appeal. Where the facts of the alleged error were known at the time of appeal, failure to raise the issue at the latter and an effort to proceed by a collateral §2255 action constitutes a deliberate by-pass of the appropriate remedy—a direct appeal. *Grieco* v. *United States, supra.* Petitioner has thus waived the proper remedy and §2255 relief is barred. Petitioner's application is therefore dismissed.*

It Is So Ordered.

Entered:
/s/ R. W. McLaren
United States District Judge

Dated: April 28, 1975

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* This disposition does not reach petitioner's voluntariness argument and therefore the Court expresess no views on that subject.